DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

50961

FILE: B-125037 DATE: AUG 4 1975

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MATTER OF: Incentive pay for members removed from flying status

DIGEST:

1. Air Force policy which in unusual cases retains enlisted members on flight status by distributing flight duty among more enlisted members than necessary so as to prevent termination of flight status and incentive pay without 120 days' notice is questionable administrative practice but, it may not be said as a matter of law that members in such cases are not entitled to incentive pay.

2. Proposed amendment to Executive Order No. 11,157 which would authorize incentive pay for up to 120 days to enlisted members involuntarily removed from flight status without notice is reasonably restricted to effecting the primary purpose of the statute (37 U.S.C. 301) authorizing such pay and, therefore, would be valid.

This action is in response to a letter, with enclosures, from the Assistant Secretary of Defense (Comptroller), requesting a decision concerning the legality of payment of incentive pay under 37 U.S.C. 301 to certain enlisted aircrew members of the Armed Forces to be made in accordance with a new Air Force policy discussed therein. Additionally, a decision is also requested as to whether Executive Order No. 11,157, June 22, 1964, as amended, may be further amended to authorize payment of incentive pay to such members after removal from flight status, or whether new legislation must be enacted for that purpose.

The Assistant Secretary indicates that the Committee on Armed Services, House of Representatives, during its consideration of H.R. 12670, which became the Aviation Career Incentive Act of 1974, Public Law 93-294 (May 31, 1974), 88 Stat. 177, expressed disapproval of the precipitate removal of enlisted members from flight status (ending their entitlement to incentive pay) after extended periods of continuous flying. The

PUBLISHED DECISION
55 Comp. Gen. .....

Committee indicated that such action represents insensitive and unnecessary personnel administration which can be avoided with proper personnel planning.

The Assistant Secretary points out that the Committee Report (H.R. Rep. No. 93-799, 93d Cong., 2d Sess., 17-18 (1974), states as follows:

> "GROUNDING OF ENLISTED CREW MEMBERS IN THE AIR FORCE
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> "The present legislation concerns flight pay for commissioned-officer and warrant-officer personnel. Enlisted personnel receive incentive pay for hazardous duty under a separate pay scale and on the basis of receiving the incentive pay only when flying. Obtaining an adequate number of volunteers for flight duty among enlisted personnel in the Armed Forces has not been a problem; and their training as regards their flight duty is, in most cases, relatively low in cost and shorter in terms of training time than is the case with officer personnel. Enlisted personnel, in addition, hold a particular speciality, and such additional compensation as may be required because of retention shortages in their specialty is paid through other methods, such as proficiency pay or enlistment or reenlistment bonuses.
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> "However, testimony from the Air Force Sergeants Association brought to the attention of the committee a situation in the Air Force involving the precipitate removal from flying duty of enlisted air crew members after extended periods of continuous flying duty.
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> "In December of 1971, for example, 607 Air Force enlisted air crew members were informed of their removal from flying duty. In some cases, notice of as little as a few days was given to the personnel involved, resulting in a sudden and unexpected loss of income.

"The committee believes this was an example of insensitive and unnecessary personnel administration and can certainly be avoided with proper personnel planning. The committee recognizes that there would not be a sound basis for establishing an excusal program for enlisted personnel; but the committee strongly believes there should be a reasonable period of transition between notification of involuntary removal from flying duty and termination of flight pay, particularly in cases where the personnel involved have been flying for an extended period of years.

"The committee directs, therefore, that the Department of Defense establish, by regulation, a requirement that enlisted men cannot be involuntarily removed from flying duty with less than 120 days' notice. The committee wants its intentions in this regard very clearly understood. It wants such regulation placed into effect on a priority basis, and it wishes to be informed of any delay on the part of any of the military departments in effecting such a policy change. The committee further directs that the departments study their policy to assure that in cases where an enlisted man has been on flight status for an extended period of years, he receive additional notice of a change in his status whenever possible." (Emphasis added.)

In conformity with the Committee's request, the Assistant Secretary indicates that, pending issuance of revised regulations the Deputy Assistant Secretary of Defense (MPP), by action dated March 22, 1974, advised the Military Departments to take prompt action to insure that, to the extent practicable, 120 days' advance notice is provided enlisted aircrew members who are involuntarily removed from flight status. The Assistant Secretary further indicates, however, that the Deputy Assistant Secretary advised that it would be difficult, if not impossible, to assure the 120 days' notification in all cases, and he noted that legislation would probably be necessary to pay incentive pay to enlisted aircrew members for up to 120 days when they were no longer on flight status.

The Assistant Secretary indicates that on July 15, 1974, the Air Force established a policy authorizing the temporary retention of enlisted aircrew members on flight status beyond the time when a valid manpower authorization exists for that many enlisted aircrew members at a particular duty station. It is stated that the overmanning authorized by this policy is intended to last only long enough to insure that each enlisted aircrew member receives 120 days' notice of removal from flight status and loss of incentive pay. Further, the policy applies only to members whose flight status was terminated involuntarily, and does not apply to members whose flight status was terminated as a result of the member being separated, confined, relieved for cause, reduced in grade, no longer medically fit for such duty, absent without leave, or transferred to ground duty at his own request.

The Assistant Secretary further states that aircrew members affected by this policy would use "banked time"--we presume that to mean flying time already accumulated in excess of the current month's requirement--to qualify for incentive pay during the 120-day period. When banked time is insufficient or does not exist, such members would perform flight duties so as to qualify for incentive pay. The Assistant Secretary indicates that the Air Force policy does not intend that flight duties in excess of valid mission requirements would be performed but, rather, that the required flying would be divided among all the affected enlisted aircrew members on flight status at a particular station so that each member would perform an equitable share of the flight duties. Under normal circumstances, the Air Force anticipates that each member would qualify for incentive pay.

The Assistant Secretary notes that Executive Order No. 11,157, which implements 37 U.S.C. 301, the statutory authority for incentive pay, provides that members who are required by competent orders to participate frequently and regularly in aerial flights, other than glider flights, must meet certain minimum flight requirements in order to be entitled to incentive pay as crew members. The minimum flight requirements for members on active duty are four hours of flight during one calendar month.

The Assistant Secretary requests the views of this Office regarding payments of incentive pay to enlisted aircrew members made in accordance with the Air Force policy described above. He indicates that no decision of the Comptroller General has been found which addresses the situation, however, he cites several decisions in which it was held that where an appropriation is made for a particular purpose, by implication it confers

authority to incur expenses which are necessary and proper or incident to the proper execution of that purpose. 50 Comp. Gen. 534, 536 (1971), 29 Comp. Gen. 419, 421 (1950), 17 Comp. Gen. 636 (1938), and 6 Comp. Gen. 619, 621 (1927). He states that since the Air Force policy would result in the payment of incentive pay to enlisted aircrew members whose performance of flight duties is no longer required to fulfill valid mission requirements at a particular station, it would appear questionable that such payments can be considered "necessary and proper" to the fulfillment of mission requirements.

On the other hand, the Assistant Secretary states that the Air Force considers that its policy is "necessary and proper" to fulfill the legitimate purpose of effective incentive pay management, that is, to induce members to voluntarily perform certain hazardous duties. The resources authorized to achieve this goal are a certain number of flying hours, a certain number of man-years, and a certain amount of funds for incentive pay, with the view being that management and distribution of these resources within the prescribed limitations is the responsibility of personnel managers. Providing adequate notice of termination of flying status is an important aspect of management of the incentive pay program. Consequently, the Air Force believes that orders authorizing temporary overmanning at a particular station in accordance with its policy are justified and that any payments made to enlisted aircrew members are "necessary and proper."

In addition, the Assistant Secretary requests the views of this Office as to whether Executive Order No. 11,157, as amended, may be further amended to authorize payment of incentive pay to such members after removal from flight status, or whether new legislation must be enacted for this purpose. The Assistant Secretary also asks, if it is decided that the Executive order may be amended to authorize such payments, is the following proposed new section 114 of the Executive order sufficient for that purpose:

> "114. Under such regulations as the Secretary of Defense, the Secretary of Transportation with respect to the Coast Guard when not operating as a service in the Navy, or the Secretary of Commerce and the Secretary of Health, Education and Welfare,

with respect to enlisted members within their respective jurisdiction, may prescribe, any enlisted member who has been required by competent orders to perform aerial flight as a crewmember and who is involuntarily removed from aerial flight duties under circumstances prescribed by such regulations with less than 120 days advance notice be deemed to have fulfilled all of the requirements for payment of incentive pay for aerial flight duties for a period of up to 120 days from the date he was notified of such removal."

The Assistant Secretary states that the amendment would permit the Secretary of Defense to prescribe circumstances when enlisted aircrew members involuntarily removed from flight status would continue to receive incentive pay for a period of 120 days after notice of termination of flight status. He further states that it is contemplated that, as in the case of the Air Force policy, this authority would be used only in such circumstances as national emergencies, short notice unit deactivations, and manpower authorization reductions where it is not possible to give 120 days' advance notice. Where members are removed from flight status because they are separated, confined, relieved for cause, reduced in grade, no longer medically fit, absent without leave, or transferred to ground duty at their own request, incentive pay would still terminate on the date of removal from flight status regardless of how much, if any, advance notification is given.

The Assistant Secretary states that the justification for this procedure is much the same as described for the new Air Force policy, i.e., it is necessary for effective incentive pay management. However, it is stated that such procedure would have the additional advantages of (1) not encouraging any overmanning, thus permitting quicker transfers to new duty stations, and (2) applying to all eligible members without their having to meet subsequent flying hour requirements (unlike the Air Force policy which retains the member on flying status, but cannot always guarantee that he will fly the hours necessary to receive incentive pay).

As support for the proposed amendment, the Assistant Secretary notes that section 110 of Executive Order No. 11,157 authorizes a similar policy in providing that a member required by competent orders to perform hazardous duty who becomes injured or incapacitated as a result of performing such duty shall continue to receive incentive pay for a period of not to exceed three months. Under this provision members continue to receive incentive pay for a limited period although they are not and may never again perform hazardous duty.

The statute authorizing incentive pay for enlisted aircrew members is 37 U.S.C. 301(a), as amended by section 2 of the Aviation Career Incentive Act of 1974, supra, and provides in pertinent part as follows:

> "(a) Subject to regulations prescribed by the President, a member of a uniformed service who is entitled to basic pay is also entitled to incentive pay, in the amount set forth in subsection (b) or (c) of this section, for the performance of hazardous duty required by orders. For the purposes of this subsection, 'hazardous duty' means duty—
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> > "(1) as an enlisted crew member, as determined by the Secretary concerned, involving frequent and regular participation in aerial flight; * * *"

Section 104 of Executive Order No. 11,157 prescribes the minimum flight requirements for the receipt of incentive pay as an enlisted aircrew member. As a general rule, members who are in a flight status and fulfill the minimum flight requirements of the regulations are entitled to incentive pay. See 48 Comp. Gen. 81 (1968) and cases cited therein.

Concerning the Air Force policy, it appears that its application would be limited to a relatively few extraordinary instances, involving relatively few members, in whose cases 120 days' notice of removal from flying status could not be given. Incentive pay would still be paid only to members who met the requirements of the law and regulations and, therefore, funds appropriated for such pay would be used for the purpose for which it was appropriated. In such circumstances, it does not appear that we can say as a matter of law that incentive pay may not be paid to members who, under that policy, meet the requirements of the statute and regulations for such pay.

However, as a matter of sound administration and use of appropriate resources, the policy appears questionable in view of its overmanning features. Accordingly, it is our view that every effort should be made by the Air Force to manage personnel in such a way as to insure, whenever possible, 120 days' advance notice of termination of flying status and to discourage overmanning. We believe this view is entirely consistent with the view expressed in House Report No. 93-799, supra.

Concerning the proposed amendment to Executive Order No. 11,157, as the Assistant Secretary notes, section 110 currently provides similar authority to continue to pay incentive pay, not to exceed three months, to injured or incapacitated members under certain circumstances even though such members are not actually fulfilling the requirements for such pay. That provision, or similar provisions in previous Executive orders, has been in effect for many years. Concerning a similar provision, it was stated in 33 Comp. Gen. 436,439 (1954), as follows:

> "Incentive pay is a special pay authorized for the performance of hazardous duty, in this case the performance of aerial flights. The statute itself recognizes no right to the special pay for periods during which flights are not performed and, therefore, a regulation issued under the statute permitting, under certain conditions, the temporary continuance of incentive pay without performance of that special duty is subject to strict construction. Only on the basis that such a regulation is reasonably restricted to effecting the primary purpose of the statute can its validity be recognized."

We also note that under section 108(c) of Executive Order No. 11,157, a member who is entitled to incentive pay for duty involving parachute jumping may have the minimum requirements for such pay waived for any period that he is unable to perform the required jumps by reason of being engaged in combat operations in a hostile fire area designated under 37 U.S.C. 310 (1970). See 45 Comp. Gen. 451 (1966).

The provisions of the proposed amendment limited in application by service regulations, as stated by the Assistant Secretary, in our view are reasonably restricted to effecting

the primary purpose of the statute and, therefore, would validly authorize incentive pay to members who are involuntarily removed from flight duties with less than 120 days' notice. Accordingly, additional legislation does not appear necessary for this purpose.

It is also our view, for the reasons stated by the Assistant Secretary, that this procedure is superior to the Air Force policy discussed above.

As a technical matter, it is noted that section 105 of the Executive order provides that members "shall not be entitled to receive incentive pay for participation in aerial flights for any period while suspended from such participation * * * except as otherwise provided in section 110 hereof." It would appear that that section should also be amended to reference the new section 114 as an additional exception thereto.

The Assistant Secretary's questions are answered accordingly.

R.F. KELLER

Deputy Comptroller General
of the United States